



**Comptroller General  
of the United States**

**Washington, D.C. 20548**

# Decision

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**Matter of:** Electronic Design, Inc.

**File:** B-279662.5

**Date:** May 25, 1999

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Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

An offeror's access to ship configuration drawings under a solicitation for ship alterations is not an unfair competitive advantage where the solicitation sufficiently identifies requirements for preparing proposals for all offerors and the offeror's access to the drawings is not the result of unfair motives or actions on the part of the government.

## DECISION

Electronic Design, Inc. protests an award to Litton Integrated Systems Corporation, Guidance and Control Systems Division, under request for proposals (RFP) No. N00024-98-R-4013, issued by the Department of the Navy, Naval Sea Systems Command, for integrated ship control system upgrades for CG 47 Ticonderoga class ships. Electronic Design contends that Litton had an unfair competitive advantage.

The protest is denied.

The RFP, as amended, contemplated the award of a fixed-price contract, with options, for upgrades on 27 CG 47 class ships through fiscal year 2004. RFP amend. 011, at 2, 8-13; Agency Supplemental Report, Apr. 26, 1999, at 11. The Navy received

four proposals, including EDI's and Litton's, by the closing date of February 27, 1998. Agency Supplemental Report at 14. After conducting discussions and evaluations, the Navy awarded a \$138,624,300 contract to Litton on May 14. Id. at 17. On May 22, EDI protested that award and on May 27 the Navy issued a stop work order under Litton's contract. Id.

On August 31, our Office sustained EDI's protest, finding that the agency had not considered price as a significant evaluation factor and had unequally applied a stated page limitation to the proposals. Electronic Design, Inc., B-279662.2 et al., Aug. 31, 1998, 98-2 CPD ¶ 69.

In response, the Navy reopened the competition to the four original offerors and amended the RFP. Agency Report at 4; Agency Supplemental Report at 17. The Navy received three revised proposals by the closing date of November 16, including Litton's and EDI's.<sup>1</sup> Agency Report at 4. Following discussions, the Navy requested and received final proposal revisions by January 21, 1999. Id. Litton's proposed price was \$129,875,000 and EDI's was \$150,509,831. Id. The Navy again selected Litton's proposal for award and on February 4 lifted the stop work order. Id. The present protest followed.

EDI's protest concerns an alleged unfair competitive advantage of Litton in the recompetition arising from Litton's access to detailed current configuration drawings of CG 47 class ships obtained from Ingalls Shipbuilding, Inc.--a corporate affiliate of Litton, a subcontractor under Litton's proposal, and the Navy's planning yard contractor for the CG 47 class ships. Protest at 8-10. In order to resolve this issue, it is necessary to first discuss the Navy's repair and modernization contracts, Ingalls' planning yard contract, and the CG 47 current configuration information that Ingalls provided to Litton after EDI's initial protest.

After a ship is built for the Navy, there generally are three types of contracts related to its repairs and modernization. Agency Supplemental Report at 4. A planning yard contract provides for general engineering and technical support for a class or classes of ships. Id. An availability contract is generally to perform repairs and upgrades on a specific ship. Id. A ship alteration (SHIPALT) contract is for the design and installation of a new system and, though separate from the availability contract, installation of the new system on a specific ship is often performed during the same time as the availability contract for the ship. Id. The contract awarded under the present RFP is a SHIPALT contract. Id. at 4, 11.

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<sup>1</sup>The EDI proposal represented an alliance between EDI and the Raytheon Alliance, which was one of the four original offerors. Protest at 2. The Raytheon Alliance was comprised of Raytheon Naval and Maritime Systems, CAE Electronics Inc. and other firms. Agency Letter, Apr. 19, 1999, attach. a, Raytheon Alliance Proposal, at 3.

Planning yard functions are carried out in accordance with the Fleet Modernization Program (FMP) Management and Operation Manual, which designates the planning yard contractor as the “engineering design agent for assigned specific classes of ships” and states its corresponding responsibilities. *Id.* at 5; Agency Report, Tab 19. When the Navy undertakes a modernization project on its ships, the planning yard contractor is typically tasked with developing a ship alteration record (SAR) and ship installation drawings (SID), and with performing shipchecks. Agency Supplemental Report at 5. The SAR provides the basic criteria for the development of design, installation drawings, other documentation, and a record of the Navy’s approval of the ship configuration change. Agency Report at 5 n.5. SIDs include system drawings, structural drawings, ripout drawings, and other drawings and information as required. *Id.* at 6 n.6; Agency Supplemental Report at 5 n.5. A shipcheck is a walkthrough of a ship to determine whether existing drawings are accurate and whether there are items that might interfere with the installation of new equipment. Agency Report at 6 n.7. A relevant difference between standard availability contracts and SHIPALT contracts, for purposes of the planning yard contractor developing the SAR and SIDs, is that, for an availability contract, the design is established prior to the competition and the SAR and SIDs are prepared and available to competitors during the competition, whereas, for a SHIPALT contract, the Navy solicits proposals for the design of the modernization work and, since the SAR and SIDs must capture the winning design, the SAR and SIDs are not available until after the competition. Agency Supplemental Report at 5.

Ingalls developed the detailed design for the CG 47 class ships, and built 19 of the 27 ships in this class. Agency Report at 5; Agency Supplemental Report at 2, 6. In October 1995, Ingalls was awarded the planning yard contract to support all of the maintenance and modernization processes for this ship class. Agency Report at 5; Agency Supplemental Report at 6. Ingalls’ responsibilities also included maintaining the CG 47 Class Central Data Repository, which includes computerized databases for storing and retrieving drawings reflecting the configuration of each ship in the class.<sup>2</sup> Agency Report at 5-6; Agency Supplemental Report at 3, 5.

Ingalls’ planning yard contract contained an organizational conflict of interest (OCI) provision, which stated that the only potential OCI inhibiting Ingalls from competing on other contracts was related to certain contract requirements to support the development of ship modernization and repair specifications. Agency Supplemental Report at 6-7; Agency Letter, Apr. 19, 1999, attach. f, Waiver of OCI Provisions, encl. 3, OCI clause. On May 10, 1996, 6 months after the planning yard contract commenced, the Navy instructed Ingalls to stop performing all work associated with the

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<sup>2</sup>The government routinely grants contractors access to such databases. Agency Supplemental Report at 3.

development of modernization and repair specifications. Agency Supplemental Report at 7.

By letter dated October 7, 1997, Ingalls advised the Navy that it wanted to compete on the installation phase of planned conversions to the CG 47 class ships. Agency Report, Tab 31. The letter stated that Ingalls does not perform work associated with the development of specifications and that its competing under the conversion solicitations should not present a conflict of interest. Ingalls requested the Navy to confirm that Ingalls' performance of the planning yard contract would not conflict with Ingalls being able to compete on CG 47 class conversion solicitations. Id.

On December 24, 1997, the Navy granted a waiver to the OCI provisions contained in Federal Acquisition Regulation (FAR) Subpart 9.5 (June 1997) and permitted Ingalls to both perform the planning yard contract for CG 47 class ships and compete under solicitations for CG 47 conversions. Agency Letter, Apr. 19, 1999, attach. f, Waiver of OCI Provisions. The waiver identified provisions for mitigating any potential conflict and stated:

Inasmuch as there is a potential OCI, notwithstanding the mitigation efforts, and it is imperative that Ingalls, the only source for this [planning yard] Contract, continue to perform critical Planning Yard efforts, . . . a waiver of FAR 9.505 is in the best interests of the Government.

Id. at ¶ 7.

In January 1998, the Navy approved the cost justification for proceeding with the SHIPALT for the integrated ship control upgrades for CG 47 class ships. Agency Report at 5; Agency Report, Tab 20, Justification Cost Form. The first installation was planned for July. Agency Report, Tab 20, Justification Cost Form. In March, the Navy issued a task order under the Ingalls' planning yard contract to prepare the SAR and SIDs for this SHIPALT. Agency Letter, Apr. 19, 1999, attach. g, Technical Instruction No. 128. The statement of work (SOW) for this task stated that the planning yard contractor "will review vendor installation drawings for first installation and develop SIDs for follow-on installations." Id.

On May 15, the day following the initial award to Litton, that contractor began providing its drawings to Ingalls for use by Ingalls in developing SIDs pursuant to the planning yard task order. Intervenor Supplemental Comments, Apr. 26, 1999 at 5-7. Ingalls' performance under the task order was not affected by the Navy's May 27 stop work order to Litton following the initial award under the RFP. Agency Report at 6. Ingalls began drafting the SIDs required under the task order and, during July and August, provided preliminary drawings to Litton. Intervenor Supplemental Comments, Apr. 26, 1999, at 9, exh. D, at 2; Protester Comments at 5; Intervenor Supplemental Comments, May 6, 1999, at 8.

An Ingalls design supervisor states that Ingalls was aware of the stop work order on Litton's contract and of EDI's then-pending protest of the award of that contract. Intervenor Supplemental Comments, Apr. 26, 1999, exh. D, at 2. Ingalls provided the preliminary drawings to Litton in order for Litton to verify that Ingalls had properly incorporated Litton's design information into Ingalls' drawings. Id. Ingalls determined to proceed with developing the SIDs based on Litton's design because of perceived time constraints and, even if another offeror was ultimately awarded the contract then held by Litton, Ingalls believed that subsequent modifications of the SIDs to accommodate the new contractor's design would be quicker than preparation of the SIDs from scratch. Id. at 2-3. If Ingalls had waited until conclusion of the recompetition to begin developing the SIDs, it believed that it would have been difficult or impossible to meet the Navy's performance schedule. Id. Ingalls determined that providing the preliminary SIDs to Litton would not provide Litton with assistance for proposal preparation because the SIDs were based on Litton's own design information which Litton had previously provided to Ingalls. Id. at 2.

Subsequent to EDI's first protest, EDI contacted Ingalls to determine whether Ingalls would be willing to serve as EDI's installation subcontractor. Protest at 8. EDI states that Ingalls confirmed that Ingalls would be interested in performing as installation subcontractor for EDI, but that it would not provide EDI with any detailed information on the current configuration of the CG 47 class ships. Id., encl. 5. EDI states that Ingalls advised EDI that Ingalls had developed drawings for the Navy and could not release this information. Id. at 8-9, encl. 5.

Following the recompetition, EDI learned of Litton's price reduction from its initial proposal and made inquiries to ascertain how Litton could have lowered its price. Protest at 9, encl. 5. EDI states that a potential subcontractor common to both EDI and Litton stated that Litton provided more detailed information during the recompetition in the form of a revised SOW with detailed configuration information. Id. From its other inquiries, EDI learned of the Navy's task order issued to Ingalls to develop SIDs for this SHIPALT. Id. at 9-10, encl. 5. EDI concluded that Litton had access to the SIDs prepared by Ingalls. Id.

EDI specifically alleges that an unfair competitive advantage arose by Ingalls acting improperly as engineering design agent for the government and providing to Litton alone the SIDs prepared under the planning yard contract. Protester Comments at 11; Protester Supplemental Comments, May 3, 1999, at 2-4, 10; Protester Supplemental Comments, May 7, 1999, at 1-3. EDI also alleges that it had requested configuration information from the Navy during the initial competition and was denied such information, and that the Navy was required to equalize Litton's competitive advantage by providing current configuration information to all offerors. Protest at 10-11; Protester Comments at 3, 10-12. EDI alleges that prejudice resulted essentially because Litton's access to more detailed and more current ship configuration information allowed it to more precisely identify the work effort, and refine its

technical proposal, cost estimates and contingency factors to a greater degree than other offerors, as evidenced in part by Litton's higher technical rating and by its ability to obtain fixed-priced offers from its subcontractors, which EDI was unable to do. Protest at 8-10; Protester Comments at 4-5, 8-10; Protester Supplemental Comments, May 3, 1999, at 4-9; Protester Supplemental Comments, May 7, 1999, at 3-7.

An offeror may not have an unfair competitive advantage over other competitors and, in order to protect the integrity of the procurement system, an agency may go so far as to exclude an offeror from the competition because of the likelihood that it has obtained an unfair competitive advantage. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126 at 5; Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 8. In seeking competition, however, an agency is not required to construct its procurements in a manner that neutralizes the competitive advantage that some potential offerors may have over others by virtue of their own particular circumstances, such as prior or current government contracts, where the advantages did not result from unfair motives or action on the part of the government. See MCA Research Corp., B-276865, July 29, 1997, 97-2 CPD ¶ 33 at 2-3; Optimum Tech. Inc., B-266399.2, Apr. 16, 1996, 96-1 CPD ¶ 188 at 7; Validity Corp., B-233832, Apr. 19, 1989, 89-1 CPD ¶ 389 at 6; Ross Bicycles, Inc., B-217179, B-217547, June 26, 1985, 85-1 CPD ¶ 722 at 3. EDI has failed to establish that an unfair competitive advantage existed here.

First, although EDI alleged that the Navy did not provide requested configuration information, EDI does not allege that the RFP did not contain sufficient information for it to understand the requirements and to prepare an acceptable proposal. See Protester Supplemental Comments, May 3, 1999, at 10. The RFP contained a detailed SOW, and the Navy made available a supplemental information package for a fee and provided offerors with an opportunity to examine a CG 47 class ship of substantially the same configuration that the contractor would confront at installation. Agency Supplemental Report at 11-13. The Navy did not provide additional configuration information to any offeror, including Litton.<sup>3</sup> Id. at 13.

Second, it was Ingalls, not the Navy, that transferred the preliminary SIDs to Litton. EDI does not allege, nor does the record indicate, that the Navy had knowledge (prior to the filing of the protest) of that transfer by Ingalls.<sup>4</sup> Thus, even if the transfer gave Litton an advantage, that did not result from action on the part of the government.<sup>5</sup>

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<sup>3</sup>The Navy states that current configuration drawings were available to offerors by accessing various databases. Agency Supplemental Report at 13-14.

<sup>4</sup>Although EDI initially suspected that the Navy provided the drawings to Litton after Ingalls had provided them to the Navy, Protest at 10, EDI abandoned this allegation. The record showed that the Navy had received only one drawing from Ingalls prior to  
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Third, the record does not establish that the preliminary SIDs were improperly provided to Litton. The SOW for the planning yard contract task order provided for Ingalls to review the vendor's installation drawings and to develop SIDs. Agency Letter, Apr. 19, 1999, attach. g, Technical Instruction No. 128. The SOW for the instant RFP provides for the SHIPALT contractor "to conduct direct and timely technical liaison with the planning yard, including providing upgrade documentation to support development and [Navy] approval of the SIDs." Agency Report, Tab 35, at 65-66; Agency Supplemental Report at 11. This process was started by Ingalls after Litton had been awarded the contract and prior to the stop work order being imposed under Litton's contract. Ingalls' contract performance was not stayed, however, and given the tight timeframe for Ingalls' contract work to be completed, we find nothing improper in its request to Litton to review the accuracy of Litton's design information in the preliminary SIDs prepared by Ingalls.<sup>6</sup> Since we find no impropriety in the

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the Navy's second source selection decision, and that drawing was issued on January 21, 1999, the closing date for final proposal revisions. Agency Report at 6.

<sup>5</sup>Moreover, even if the Navy had known that Ingalls provided the preliminary drawings to Litton, the Navy could not have released them to competing offerors, because they contained the proprietary design proposed by Litton in this competition. See Mortara Instrument, Inc., B-272461, Oct. 18, 1996, 96-2 CPD ¶ 212 at 5 n.6.

<sup>6</sup>EDI does not allege that Ingalls should not be permitted to participate in this competition due to an OCI. Protester Supplemental Comment, May 3, 1999, at 2-3. (Our Office did address the OCI issue for Ingalls, and upheld the legality of the Navy's OCI waiver, in a protest under a different CG 47 class procurement. See Knights' Piping Inc.; World Wide Marine & Indus. Servs., B-280398.2, B-280398.3, Oct. 9, 1998, 98-2 CPD ¶ 91.) EDI does claim that Ingalls' supplying Litton with the preliminary SIDs was inconsistent with a statement in the Navy's OCI waiver under Ingalls' planning yard contract that, in an effort to mitigate potential OCI's, after SIDs are developed and submitted to the government for review and approval, and after the government has approved them, the drawings will be available to potential offerors. Protester Supplemental Comments, May 3, 1999, at 3; Agency Letter, Apr. 19, 1999, attach. f, Waiver of OCI Provisions. EDI alleges that, since the drawings were not yet submitted to the Navy for review and approval, Ingalls, in its capacity as the Navy's engineering design agent, acted in violation of the OCI waiver in making the preliminary SIDs available to Litton. Protester Supplemental Comments, May 3, 1999, at 3-4; Protester Supplemental Comments, May 7, 1999, at 2. We disagree. The statement in the waiver referenced by EDI refers to SIDs for availability contracts and cannot be applicable to the present circumstances, which require the planning yard to develop SIDs based on the awardee's design. See Agency Supplemental Report at 5.

action of Ingalls as the Navy engineering design agent, there is no basis to impute improper action to the Navy under that relationship.<sup>7</sup>

Fourth, the record shows that the competitive advantage here is basically attributable to Litton's and/or Ingalls' contract experience with the CG 47 class vessels and application of that experience to proposal preparation largely before Ingalls was even tasked to develop the SIDs in question. This competitive advantage first arose with Litton's preparation of its initial proposal. Litton made a business decision to begin, at its own expense, designing the system it would propose even before the RFP was issued. Intervenor Supplemental Comments, Apr. 26, 1999, at 2. Part of its efforts included drafting an installation SOW, and subsequent revisions. Litton states that it prepared its SOWs from information in the RFP, its own drawings of the control systems that it manufactures, and CG 47 class ship drawings previously obtained during the construction of the ships. *Id.* at 4. This SOW, including all revisions, was examined by counsel for the protester under a protective order. *Id.* at 3; Protester Comments at 8-9. The revision provided to Litton's prospective subcontractor on October 26, 1997, well before Ingalls' task order, was described by protester's counsel as:

[A] 64 page document identifying 137 "as-built" CG 47 Class drawings, a list of cables to be deleted from eight of the systems, a detailed, revised estimate of 49,300 feet of cable to be installed and 28 drawings related to the configuration of the Litton-proposed system.

Protester Comments at 9.

Litton's final revised SOW totaled 110 pages, contained additional information, and was given to the potential subcontractor on June 10, 1998, which was before Ingalls provided the preliminary SIDs to Litton in July and August. *Id.* As EDI alleged, it was this detailed information in Litton's SOWs that created a competitive advantage. Protest at 8-9, encl. 5. Thus, we find that the competitive advantage possessed by Litton arose from its extensive information gained under other contracts and from preparing a detailed design and proposal. This is an advantage derived from Litton's experience, and thus is not unfair and need not be neutralized by the agency (through the provision of additional information in the RFP or otherwise).<sup>8</sup>

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<sup>7</sup>Although EDI references the designation of Ingalls as "engineering design agent," the record does not show that the Navy bestowed any traditional procurement functions upon Ingalls under this designation, such as responsibility for distributing solicitation information to potential offerors.

<sup>8</sup>In contrast, EDI provided this same prospective subcontractor a two-page work statement. Although EDI initially denied that it had access to configuration information, the Navy provided evidence that EDI's alliance members worked on a  
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Finally, we note that EDI does not protest the propriety of Ingalls participating in this competition while it performs as planning yard contractor. If Ingalls can compete while it holds the apparent competitive advantage accruing from its current performance as the planning yard contractor, we fail to see why it is objectionable for Ingalls to share its competitive advantage in a prime contractor/subcontractor relationship.<sup>9</sup> See Signal Corp., B-241849 et al., Feb. 26, 1991, 91-1 CPD ¶ 218 at 7.

In sum, since there is no evidence of impropriety or of unfair government motives or actions, the record does not support a finding that an unfair competitive advantage existed here.

The protest is denied.

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of the United States

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CG 47 class contract in cooperation with Ingalls during the competition and had access to the CG 47 class database. Agency Supplemental Report at 23. EDI has not provided any persuasive explanation as to why EDI did not, or could not have, used this to prepare a more detailed SOW with configuration information.

<sup>9</sup>To the extent Ingalls was a competitor, there can be no doubt it was not acting as the government's design agent. Thus, to the extent EDI is protesting that Ingalls, as a potential subcontractor, was treating potential prime contractors unequally, EDI's complaint rests with a private party, not the contracting agency or the federal procurement system.